SUPREME COURT, U.S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-

No. 6554

ROBERT D. COOK,
Plaintiff-Appellant,

versus

BELDEN CONCRETE PRODUCTS, INC.,
DIVISION OF ROCKWIN CORPORATION,
Defendant-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ROBERT D. COOK,
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BELDEN CONCRETE PRODUCTS, INC.,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May It Please The Court:

STATEMENT OF THE CASE

Petitioner in his statement of the case essentially covered the relevant facts in the present case. However, in his efforts to change a matter of law into a question of fact, a certain amount of confusion was interjected which may have the effect of misleading this Court. Therefore, a short statement will be presented in order to clarify the scene.

Belden Concrete Products, Inc. is a corporation engaged in the manufacture of all types of concrete products. It maintains a yard, part of which fronts on a

slip off the Industrial Canal in New Orleans, Louisiana. This slip is an essential part of Belden's operation in the construction and launching of concrete barges.

The concrete barges are constructed by assembling prefabricated parts, which have been formed on land, on a construction platform, which floats in a slip off the Industrial Canal. The Fifth Circuit stated that,

> "The construction platform where the injury occurred consisted of a flat deck barge approximately 180 by 54 feet upon which Belden employees fabricated concrete barges. The platform had no motive power and could be moved only by the use of tugboats or land-based cranes. It was equipped with pipes and pumps for flooding or evacuating its interior compartments thus permitting its decks to be submerged to launch completed barges. During the fabrication of barges the platform would occasionally be moved to different positions alongside the defendant's dock to pick up materials. Upon completion of construction of a set of barges, the platform would be towed a shorter distance into deeper water for launching.
>
> At the time of his injury, Cook was employed as a carpenter erecting forms preparatory to pouring concrete for a second deck on a half-completed barge. The construction platform was secured to appellee's dock by ropes — the normal method of mooring the platform during the construction process."

QUESTIONS PRESENTED

Do the lower Courts err in granting summary judgment to respondent holding that as a matter of law the construction platform was not a vessel for maritime jurisdictional purposes?

REASONS FOR DENYING THE PETITION

1) The Courts below were correct in granting respondent's Motion for Summary Judgment because there was no genuine issue of material fact.

2) The Courts below correctly followed the controlling rule of law promulgated by *Atkins* and its progeny.

3) The Fifth Circuit and the United States Supreme Court have consistently held that drydocks are not vessels.

4) There has been no conflict created between these Circuits by the Fifth Circuit Court of Appeal, and in fact, the present case has already been cited with favor by the First Circuit Court of Appeal.

ARGUMENT

I.

The force of petitioner's argument on the first issue is directed to whether a question of material fact exists. The first thrust is directed at distinguishing the *Atkins* case on the ground that Atkins involved a "true drydock" in the "traditional sense." Secondly, petitioner argues that because the drydock in *Atkins* and

the drydock *sub judice* are different, an issue of fact is presented. Thirdly, petitioner attempts to muddy the waters by claiming that the construction platform was in some way engaged in navigation. Finally, petitioner attempts to distinguish the *Keller* case on the ground that in *Keller* the drydock was moored to Dravo's dock by cables and chains, and in the present case, the construction platform or drydock was moored by ropes.

Throughout the development of jurisprudence, no encompassing definition of a "drydock" has ever been presented. Probably the closest definition of a drydock was presented in the case of *Avondale Marine Ways, Inc. vs. Henderson*, 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed. 77 (1953). In a concurring opinion, Justice Douglas stated:

> "There are three kinds of drydocks. (1) a floating drydock, as its name makes clear, floats on the water, the vessel resting on the bottom of the drydock after the water has been removed. (2) a graving drydock is dug into the land. The vessel floats but rests on land once the water has been pumped out. (3) finally there is the marine railway, on which the vessel is drawn away from the water, instead of the water being drawn away from the vessel. A ship is no more and no less on land when it rests on a graving drydock than when it rests on a marine railway. The three types of drydocks are not different in kind; functionally they are the same. And I see no basis for concluding that

> Congress treated one differently from the others for the purpose of this act." 98 L.Ed. at 79.

It is easily discernible from this opinion that the function of the three types of drydock is the same. Basically, it is to provide a dry area for working on a vessel, and then returning it to the water. The drydock in question does fit this description. The only difference between the drydock in the definition and the present drydock is that the definition presupposes a drydock for the repair of vessels wherein the drydock must be submerged to receive the ship. In the present case, the vessel is constructed on the drydock, and after completion, the drydock is submerged to release the vessel into the slip.

Other Courts have also commented on the definition or purpose of drydocks. In the case of *Travelers Insurance Company vs. Shea*, 352 F.2d 344, 5th Cir., (1967), the Fifth Circuit had the opportunity to distinguish between floating barges which had been removed from navigation and a drydock. The Court stated at page 349:

> "A drydock functionally as well as nautically is different from a floating barge. A drydock lifts or shifts the ship. If it is to be a drydock, it submerges or fills with water."

From the undisputed facts in the present case, the only way the newly constructed barge could be removed from the construction platform would be to submerge

the platform. This, of course, is in accordance with the definition formulated by this Court.

Other cases which have dealt with the problem are *Cope vs. Vallette Dry Dock Co.*, 119 U.S. 625, 30 L.Ed. 501, 7 S.Ct. 336, and *Maryland Casualty Company vs. Lawson*, 101 F.2d 732, 5th Cir., (1939). In *Cope*, the Supreme Court, in speaking of a drydock, stated, "The fact that it floats on the water does not make it a ship or a vessel." In the *Maryland* case, this Court had the following to say about a drydock:

> "A floating drydock receives a vessel when the dock is submerged, after which the water-tight compartment of the dock are pumped out and the buoyancy of the dock raises the vessel."

In both cases, the functional aspect of the drydock is clear. It provides a dry area on which to work, and it is capable of being submerged for the entry and removal of vessels. In the present case, the fact that vessels were constructed on the dock rather than floated on the dock is of no consequence.

In its opinion, the Fifth Circuit quoted this Court as having ruled,

> "As the Supreme Court pointed out in *The Robert W. Parsons* the 'determinative factors upon the question of jurisdiction [are] the purpose for which the craft was constructed and the business in which it is engaged'. 191 U.S. 17, 24 S.Ct. 8, 48 L.Ed. 73 (1903)." *Cook vs.*

Belden Concrete Products, Inc., slip opinion p. 4.

The final case offered on the subject is *Continental Casualty Company vs. Lawson*, 2 F.Supp. 459 (S.D. Fla. 1932), *rvsd. on quantum*, 64 F.2d 802, 5th Cir., (1933). The lower Court was confronted with the situation involving a carpenter who was repairing a vessel under a maritime contract. The question before the Court was to determine whether a vessel which had been lifted from the water by a cradle onto a dock was on a drydock. The Court noted that with modern technology, new methods would probably be devised using old principles. Speaking of a drydock, the Court stated:

> "Whatever may have been the definition of a drydock in the past, the definition must be enlarged to include modern facilities for repairing boats out of the water, as the meaning of the term, used in its common, ordinary sense, means a dry place to work in."

The fact that the construction platform or drydock in question was used solely for the construction of new vessels, rather than repair, does not in any way make the platform less of a drydock.

Nor can the construction platform be considered to have been in navigation. After examining the material facts, the Fifth Circuit had the following to offer:

> "However, capability to sustain such movement has been held insufficient to establish

that such craft are constructed for the purpose of navigation. *The Robert W. Parsons, supra; Berton vs. Tietjen & Land Dry Dock Co.*, 219 F. 763, 774-5 (D.N.J. 1915).

Although the floating construction platform was not designed for the purposes of navigation, the structure might be classified as a vessel subject to liabilities arising from an allegedly unseaworthy condition, if at the time of appellant's injury it had actually been engaged in navigation. However, from the pleadings and depositions it is clear that at the time of the mishap the craft was secured to the appellee's dock and engaged in its primary function as a stationary construction platform. Under this circumstance, we find that the status of the craft, governed by the proposition that, 'as a matter of law, a floating drydock is not a vessel *when it is moored and in use as a drydock.' Keller vs. Dravo Corp., supra,* 441 F.2d at 1239; *Chahoc vs. Hunt Shipyard, supra; Atkins vs. Greenville Shipbuilding Corp., supra.*" Slip Opinion p. 6.

It is undisputed that the sole purpose of the drydock was the construction and launching of concrete barges. The fact that the platform was towed to Avondale Shipyard for major repairs in 1969 does not have anything to do with its function. Indeed, it had no bearing in the *Keller* case. Likewise, the fact that the drydock was moored by ropes instead of chains does not in any way make it less of a drydock. Regarding this argument, the Fifth Circuit commented as follows:

> "Appellant urges that we distinguish case *sub judice* from *Keller* on the basis that here the mooring was by ropes and there it was by chain and cable. This is a distinction without legal difference."

The material facts remain undisputed. At the time of the accident, the drydock was in use as a construction platform and was moored to Belden's dock.

It becomes evident that there is no genuine issue as to any *material* fact in the present case. The law is quite clear that a submersible construction platform used in the construction and launching of concrete barges fits within the meaning of "drydock". The fact that the object is not a "true drydock" in the "traditional sense" does not in any way make it less of a drydock. The construction platform serves the same functional purpose of a "true drydock" and fits within the traditional and modern definition.

II.

The Fifth Circuit has for some time held that drydocks are not vessels. If there is no vessel, there can be no warranty of seaworthiness, nor can there be any member of a crew more or less permanently connected to a vessel.

Petitioner, in his brief, states that the lower Courts erred in failing to distinguish the present case from *Atkins*. What petitioner is really trying to do is to amputate the legs of three cases on all fours. An examina-

tion of *Atkins* and its progeny clearly shows that the present case falls within the rule of the law established by those cases.

In *Atkins vs. Greenville Shipbuilding Corp.*, 411 F.2d 279 (5th Cir., 1969), the Fifth Circuit held that as a matter of law a drydock is not a vessel. The *Atkins* case involved the following relevant facts.

1. The floating drydock was not a vessel.
2. Atkins was injured on a drydock.
3. The drydock was capable of being submerged.
4. After being submerged the dock was lifted by pumping air into the compartments.
5. The dock was connected to land by cables.
6. The dock was floating.

When applied to the present case, common sense indicates that these facts are again all present.

1. The construction platform was floating.
2. It was connected to land by ropes.
3. After being submerged, its compartments were filled with air in order that the drydock could be refloated.
4. The construction platform was capable of being submerged and was in fact submerged.
5. Cook was injured on the drydock.
6. Therefore, the floating drydock was not a vessel.

The analogy between the two cases is quite clear. The fact that some of the compartments of the construction platform were at one time used as barges by a different owner does not render the modified structure, which is a *de facto* drydock, a vessel. The undisputed material facts show that at all times pertinent, the construction platform was moored and in use as a drydock.

If a case could possibly be more on point than *Atkins*, it would be *Keller vs. Dravo Corporation*, 441 F.2d 1239 (5th Cir., 1971). In *Keller*, defendant's affidavit stated that the drydock was not designed for nor used in navigation. Plaintiff's affidavit stated that the drydock was equipped with navigational aids and was moved about, much like the assertions in the present case. However, the Fifth Circuit stated that as to any *material* fact, there was no dispute. First, that at the time of the mishap the dock was engaged in its primary function as a drydock, and secondly, at the time of the injury, it was moored to defendant's dock.

In the present case, as in the *Keller* case, there is no dispute as to the facts that at the time of the injury, the present drydock was in use as a construction platform, and it was moored to Belden's dock. Since the drydock in question occupied the status of a drydock, the granting of a summary judgment by the lower Courts, as in *Keller*, was proper.

Petitioner makes much of the fact that the drydock in question moved along Belden's dock and was floated out into the slip to be sunk. The movement of the con-

struction platform has nothing to do with transportation of materials, but actually could be likened to an assembly line where certain parts were added to the new construction at different stages. Regarding the movement in the slip, it was necessary in order to be positioned in a depth of water in which the drydock could be sunk.

From an examination of the record, it is clear that the sole purpose of the construction platform in question was the construction of new concrete barges. Any movement of the platform was not for the purpose of navigation, but simply to allow the platform to take on materials to be used in new construction, and to submerge in order that the new construction could be floated into the slip.

III.

The thrust of petitioner's third argument is that if special purpose barges, such as drilling rigs which are towed into the Gulf to accomplish their mission, are vessels, it follows that drydocks should be vessels. Although this argument has been presented before, the Fifth Circuit stated that it was not disposed to reverse *Atkins. Chahoc vs. Hunt Shipyard,* 431 F.2d 576 (5th Cir., 1970).

At this time, it may be beneficial to examine the approach taken by the lower Court in *Atkins.* The plaintiff was injured when ascending a ladder from the drydock to the barge which was being repaired. The plaintiff attempted to bring an action based upon unsea-

worthiness, but was met with the defenses that he was not doing the traditional work of a seaman, and that the drydock was not a vessel. The District Court granted the motion on the first ground; the Fifth Circuit affirmed on the latter.

The Court held that the proper method of reasoning is to examine the structure in question as to its nature, purpose and character in order to determine whether it was a vessel. If the answer was affirmative, then the Court would look to the duties of the individual. In *Atkins*, the appellant contended the drydock was a special purpose vessel; the Fifth Circuit held that it was not.

In the present case, petitioner, Cook, was injured when descending a ladder leading from the new construction to the platform or the drydock. There is no question that at the time of his injury, the drydock was being used for new ship construction. Likewise, it was also moored to Belden's dock.

There is also uncontroverted evidence in the record that the construction platform was used solely for the construction of new concrete barges. The fact that the platform was moved along the dock as a matter of convenience does not change the nature of the structure. The platform was also floated into the slip. However, this movement was done to achieve the ultimate purpose of the platform — to submerge in order to allow the newly constructed vessel to be floated off. The platform would then be pumped out, and begin anew in the construction of new barges.

In the traditional sense, this construction platform could be considered nothing more than a drydock. As a matter of fact, it did not serve every purpose of a drydock, but was used solely in new ship construction, rather than construction and repair. Certainly no authority need be cited for the proposition that new ship construction is not a maritime activity.

Floatation and movement are not enough to constitute a structure a vessel. In *Keller,* an attempt was made to show that the drydock was frequently moved about and even had navigational aids. However, the material facts considered by the lower Courts were that although if used for a different purpose, the drydock may become a vessel, while it was moored and in use as a drydock, it was not a vessel. There are no facts nor reasons why the same rule should not be applied in the present case.

Petitioner also makes an analogy regarding a raft being built upon an oceangoing vessel. Suffice it to say that providing space for the building of a raft would not be the sole purpose of the vessel. Likewise, it is not possible that petitioner would have this Court believe that the vessel would be submerged in order to discharge the raft into the water.

IV.

Finally, petitioner has attempted to demonstrate to this Honorable Court that there is a conflict between the Circuit Courts of Appeals. An analysis of the cases cited by petitioner will clearly show that this point has been raised before, and considered to have no merit.

The two cases cited by petitioner are *Bernardo vs. Bethlehem Steel Co.*, 200 F.Supp. 534 (S.D. N.Y. 1961), affd. 314 F.2d 604 (2nd Cir., 1963), and *United States vs. Moran Towing & Transportation Co.*, 374 F.2d 656 (4th Cir., 1967). In *Atkins, supra*, the Fifth Circuit in speaking of the *Bernardo* decision clearly stated, "... in *Bernardo* the Court was not called upon to make the determination we make here. *Supra* 314 F.2d at 608." 411 F.2d at 283. Likewise, the Fifth Circuit distinguished *United States vs. Moran Towing & Transportation Co., supra,* in the *Chahoc* case, when the question was raised. 431 F.2d at 576 fn 2.

Furthermore, the Court's attention is directed to the case of *Powers vs. Bethlehem Steel Corp.*, ____ F.2d ____, (1st Cir., 1973), Nos. 72-1197 and 72-1198, decided April 9, 1973. (Appendix A). The case involved an individual who was injured on a raft underneath a wharf. The raft, like the drydock, had no motive power although it was afloat. All materials and power were supplied to the raft from shore. The raft was instrumental in operations directed at repairing pilings underneath the wharf.

The First Circuit cited with approval the case which is presently before this Court. The Court reasoned that in such instances, the structures were in no way used for the purpose of transportation of passengers, cargo, or equipment from place to place across navigable waters. To classify either structure as a vessel would certainly be going beyond the intent of the Jones Act and defeating the purpose of the Longshoremen and Harbor Worker's Compensation Act.

CONCLUSION

It is an inescapable conclusion that at the time of Mr. Cook's accident, he was aboard a construction platform engaged in the construction of a new vessel. This platform was in use as a drydock and was moored to respondent's dock. Under these circumstances, this Court and the Fifth Circuit has repeatedly held that the structure in question is not a vessel. It must also be noted that the Congress of the United States has declared that such people as petitioner would have an exclusive remedy under the Longshoremen and Harbor Worker's Compensation Act. It is respectfully submitted that the judgments of the lower Courts be sustained and that the Petition for Writs of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Brief in Opposition to the Petition for Certiorari have been served upon appellant, Robert D. Cook, by depositing the same, postage prepaid, in the United States mail, addressed to Mr. Carl J. Barbier, Badeaux, Discon & Cumberland, Suite 409, 234 Loyola Building, New Orleans, Louisiana.

New Orleans, Louisiana, this 28th day of June, 1973.

HENRY B. ALSOBROOK, JR.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1197

DONALD E. POWERS,
Plaintiff, Appellant,
versus

BETHLEHEM STEEL CORPORATION,
Defendant, Appellee,
versus

McKIE LIGHTER CO., INC.,
Defendant, Appellee.

No. 72-1198

DONALD E. POWERS,
Plaintiff, Appellant,
versus

McKIE LIGHTER CO., INC.,
Defendant, Appellee.

Appeals from the United States District Court for the District of Massachusetts

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Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Michael B. Latti, with whom *Robert S. Wolfe* and *Kaplan, Latti and Flannery* were on brief, for appellant.

Leo F. Glynn for appellee, McKie Lighter Co., Inc.

Charles E. Colson, with whom *Cargill, Masterman & Cahill* was on brief, for appellee, Bethlehem Steel Corporation.

April 9, 1973

CAMPBELL, Circuit Judge. Appellant Powers, a pile driver employed by McKie Lighter Co., suffered a serious eye injury as he stood on a McKie-owned raft next to Pier 3 of the Bethlehem shipyard in Boston. McKie was under contract with Bethlehem Steel Corporation, the owner of the pier, to repair the pilings underneath. Powers, who received compensation for the injury under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, commenced separate actions in the district court against McKie, claiming damages under the Jones Act, 46 U.S.C. § 688, and damages and maintenance and cure under general maritime law; and against Bethlehem, under diversity jurisdiction, claiming damages for negligence. The jury returned substantial verdicts against both defendants, jointly and severally. Powers appeals from the district court's entry of judgments notwithstanding the verdicts in favor of both defendants.

Standing under the pier on a raft or "float" owned by McKie, Powers and other workmen would first clean the piles by chipping and sandblasting, and then

place a form around them into which concrete would be poured. The raft was about twenty-five feet long and five feet wide. Without deck or railing, it was made of 12 by 12 timbers, bonded together. There were rings for lines at its four corners. The men would descend by ladder to the raft, which when not in use lay tied to the pier, lower to the raft sandblasting equipment, water pumps, and forms to be placed around the pilings, and move the raft under the pier to the piles by poling or pulling on lines attached to the pier. They would tie the raft to a larger raft on opposite sides of a row of piles, and span the rafts with planks, so that they could move between and work around the piles. Lines containing water, air, steam and electricity for cleaning, sandblasting and lighting were led from the pier by the men on the raft to where they were working.

The pier was thirty to forty feet wide. The raft's only movement was from the pier front to the piles underneath or from one row of piles to another. Even when so moving it was normally attached by at least one line to the pier.[1] It had earlier been towed by a workboat to Pier 3 from Pier 2 and had also been towed through Boston harbor to other jobs.

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[1]Sometimes, men on the pier would hold a line to guide the raft under the pier. There was a suggestion in the testimony that at a point when the raft was moving under the pier the man on the pier would drop the line to a man on the raft, but it is clear from the testimony that the raft was unattached to the pier, if at all, for only a matter of minutes.

The lighting for the work area, supplied by Bethlehem, consisted of drop lines with a male plug at one end, plugged into a fuse box, and a socket at the other with a bulb in it. The line would be slung over the side of the pier, and taken under the pier by a workman. Some but not all of the bulbs had reflectors. None had protective covering around them. The bulbs had popped frequently while the men worked, sometimes when Bethlehem supervising employees were present. As late as the week of the accident, a bulb had popped in their presence. Powers had twice complained to the Bethlehem job supervisor, recommending that the bulbs be surrounded with a steel or wire cage, with a piece of plexiglass enclosure. There is no evidence of what response Powers received, if any.

The accident happened before daylight, as Powers, standing on the raft, then attached to the pier, was preparing to move it about twenty feet to piles under the pier.[2] The light cable, supplied by a Bethlehem employee to a McKie employee, lay hanging over the side of the pier, the bulb about ten to thirteen feet above Powers' eye level. The bulb was unprotected. When Powers looked up toward the light, the bulb popped, sending pieces of glass into his eye.

This case is one more taking us literally to the water's edge, having to do with the circumstances under which a harbor-worker may become entitled to a seaman's remedies. *See Victory Carriers, Inc.* v. *Law*,

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[2]There is some suggestion in testimony that the raft may actually have commenced its movement under the pier.

404 U.S. 202 (1971). Recovery under the Jones Act or under the general maritime law for unseaworthiness requires affiliation with a "vessel" — either as a crew member or as one injured aboard doing seaman's work. *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 4, 7 (1946); *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85, 99 (1946). We believe the raft upon which Powers was injured was not a vessel.

What is a vessel, like who is a crew member, is "except in rare cases", a jury question. *Offshore Company* v. *Robison*, 266 F.2d 769, 780 (5th Cir. 1959). Nevertheless, the broad parameters of definition must be established if the terms are to have content. If what emerges from facts and inferences taken most favorably to the plaintiff[3] cannot be a vessel, the jury may not make it one. *See Thibodeaux* v. *J. Ray McDermott & Co.*, 276 F.2d 42, 46 (5th Cir. 1960); *Hill* v. *Diamond*, 311 F.2d 789, 792-3 (4th Cir. 1962); *Texas Company* v. *Savoie*, 240 F.2d 674, 675 (5th Cir. 1957); *rehearing denied*, 242 F.2d 667 (5th Cir. 1957); *cert. denied* 355 U.S. 840 (1957).

We agree with the 5th Circuit in *Cook* v. *Belden Concrete Products, Inc.*, F.2d , 41 U.S.L.W. 2406 (5th Cir. Jan. 12, 1973), that a floating construction platform secured to land is not a vessel for purposes either of the Jones Act or general maritime law. The non-vessel in *Cook* was a flat-deck barge, 180 by 54 feet, upon which employees fabricated concrete barg-

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[3]We have considered the evidence in the light most favorable to appellant, including evidence made as an offer of proof after exclusion by the court and give him the benefit of every favorable inference. *Rainey* v. *Gay's Express, Inc.*, 275 F.2d 450, 451 (1st Cir. 1960).

es. Equipped with pipes and pumps for flooding or evacuating interior compartments, but without its own propulsion, it was occasionally moved to different positions alongside the dock to pick up materials, would be towed into deeper water to launch completed barges, and had been towed considerable distances. While barges were being fabricated, it was fastened by ropes to the dock. The court said, slip opinion, at 4:

> .... in the instant case the floating construction platform was capable of limited movement and was, in the normal course of its service, towed from point-to-point in navigable waters. ... The permanence of fixation, however, is not the criterion which governs the maritime status of floating dry docks and similar structures. As the Supreme Court pointed out in *The Robert W. Parsons* [191 U.S. 17, 30 (1903)] the "determinative factors upon the question of jurisdiction [are] the purpose for which the craft was constructed and the business in which it is engaged" ....

Cook, supra, relied on cases emanating from *Cope* v. *Vallette Dry-Dock Company*, 119 U.S. 625, 627 (1887), that a floating dry-dock is not a vessel. *See Atkins* v. *Greenville Shipbuilding Corp.*, 411 F.2d 279, 283 (5th Cir. 1969), *cert. denied* 396 U.S. 846 (1969).[4] In our own

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[4]Somewhat related is the Supreme Court's classification of a so-called wharf boat as a non-vessel. *Evansville & Bowling Green Packet Co.* v. *Chero Cola Co.*, 271 U.S. 19 (1926). Secured to the shore, with quarters for men aboard and shore based power and plumbing connections, the huge craft was towed

case of *DeMartino* v. *Bethlehem Steel Co.*, 164 F.2d 177, 179 (1st Cir. 1947), holding that a floating dock was not a vessel, we cited *Berton* v. *Tietjen & Lang Dry Dock Co.*, 219 F. 763 (D. N.J. 1915), in which, at 771, the court said,

> ... A stage designed to be used in connection with painting or repairing the side of a vessel would not become [a vessel] merely because it was capable of floating on water, though it were used by workmen in thus painting and repairing, while the same was on the water, rising and falling with the tide, or because it could be moved alongside or around such a vessel, and while being moved was capable of holding such persons and property. ...

The purpose and business of the present craft was not the transportation of passengers, cargo, or equipment from place to place across navigable waters. It was tied to the pier or its pilings virtually all of the time. Nearly as long as the pier was wide, it was used to provide a stable platform for men repairing defective piles. While so used, it was lashed with the other

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each winter to a more sheltered harbor, and had sometimes been towed considerable distances. The statutory "vessel" definition under consideration in that case — "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" — was virtually the same as that in 46 U.S. § 801, arguably applicable to Jones Act cases. *See* 7A Moore's Federal Practice ¶ .215 [4]. The quoted language has never been construed as meaning simply every floating object capable of bearing weight without sinking. *See*, e.g., *Hill* v. *Diamond*, *supra*, 311 F.2d at 792-3.

raft to piles, planks being placed from raft to raft, and was indistinguishable from a permanent floating dock. *See DeMartino* v. *Bethlehem, supra.* Its brief movement consisted of being hauled, poled or paddled from the pier to the piles underneath, or from pile to pile; even when moving it was usually attached to the pier by one or more lines. Its occasional "voyages" — when towed by workboat from one pier to another — were no different from the dragging of a section of floating dock from one location to another. *See Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co., supra,* 271 U.S. at 20-21; *Cook, supra,* slip opinion, at 4-5, n. 5.

Rafts, of course, may be designed or used "to encounter perils of navigation." (*See Evansville* v. *Chero Cola Co., supra,* at 22); if so they may be vessels. *See The Mary,* 123 F. 609 (S.D. Ala. 1903); *United States* v. *Marthinson,* 58 F. 765 (E.D.S.C. 1893); *Seabrook* v. *Raft of Railroad Cross-Ties,* 40 F. 596 (D.S.C. 1889). But we cannot reasonably describe the present raft as other than a floating stage. Even with men and equipment on it, its movement, amounting mostly to a positioning under the pier incidental to its intended use, was not navigation.

The raft, moreover, was unlike special purpose floating structures whose function requires exposure to the hazards of the sea usually at some distance from the shore, such as barges, dredges, drilling platforms and floating derricks. *See Offshore Company v. Robison, supra,* 266 F.2d at 772 (mobile drilling platform with retractable legs, having a raked bow, navigation

lights bitts, anchors, bilge pumps, cranes, and life rafts, located at the time of the accident three miles offshore); *Summerlin* v. *Massman Const. Co. et al.*, 199 F.2d 715, 716 (4th Cir. 1952) (derrick anchored in a river); *Gahagan Const. Corporation* v. *Armao*, 165 F.2d 301, 305 (1st Cir. 1948) (dredge on which crew slept and ate). *Also compare Stafford* v. *Perini Corporation*, No. 71-1221 (1st Cir. March 20, 1973) (construction barge anchored two miles offshore, assumed to be vessel). These navigable craft, like conventional vessels, retain their status even when berthed for long periods or even when resting upon or attached to the bottom. *See Gianfala* v. *Texas Company*, 350 U.S. 879 (1955), *reversing Texas Company* v. *Gianfala*, 222 F.2d 382 (5th Cir. 1955).

It may well be that when a craft not designed or generally used as a vessel is in actual navigation — such as when, unattached to land, it is under tow for an appreciable distance over navigable water — it will temporarily acquire a vessel's status. *See United States* v. *Moran Towing & Transportation Co.*, 374 F.2d 656 (4th Cir. 1967), *Cook*, *supra*. However, even were the jury on conflicting evidence to have concluded that Powers' injury occurred while the raft was in process of being hauled under the pier, we do not consider such movement to be navigation.[5] Attached by a line to the pier, the raft remained a work platform while

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[5]Besides the short distance from pier to pilings, and the fact the raft remained attached to the pier, we note that piers and docks have traditionally been "deemed extensions of land". *Victory Carriers* v. *Law*, *supra*, 404 U.S. at 206-7. To term movement thereunder of this sort "navigation" would seem as strained as to call the raft a "vessel" or Powers its "crew."

being so maneuvered into position, a distance of about twenty feet. We sustain judgment for McKie.[6]

We next consider whether appellant may be allowed to recover against Bethlehem. We do not agree with him that Bethlehem's negligence is to be determined under general maritime law. *See Kermaree* v. *Compagnie General*, 358 U.S. 625, 628 (1959); *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259 (1922). Maritime law applies only where the wrong occuring on or over navigable waters "bear[s] a significant relationship to traditional maritime activity." *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 41 U.S.L.W. 4085, 4091 (U.S. Dec. 18, 1972). It would be incongruous to hold that the required relationship existed here, in the face of our conclusion that the raft was not a vessel, but, being a floating work platform, was, in effect, an extension of the pier, itself an extension of the land. See *Victory Carriers, Inc.* v. *Law*, *supra*, 404 U.S. at 206-7. Powers, a landbased piledriver, employed to repair piles from the platform, was injured by a bulb hanging over the pier. We see nothing either in his occupation or in the circumstance of the accident to

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[6]The district court erred in ruling alternatively that § 905 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 *et seq.*, barred Powers' action against McKie because Powers had collected compensation and had testified in support of his compensation claim. It was settled, at least before amendment in October, 1972, that § 905 did not bar a longshoreman or harbor worker's action against his employer, who owned the vessel where the injury occurred, despite the worker's having collected compensation. *Reed* v. *The Yaka*, 373 U.S. 410 (1963); *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731 (1967); *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). *But see* Pub. Law 92-576, 82 Stat. 1251, § 18(a) (1972), amending § 905.

invoke the law of admiralty, "designed and molded to handle problems of vessels relegated to ply the waterways of the world." *Executive Jet Aviation, Inc.* v. *City of Cleveland, supra*, 41 U.S.L.W. at 4092.

We thus turn to whether under Massachusetts law the jury could have found that Bethlehem violated a duty owed Powers. A Massachusetts landowner owes to the employees of an independent contractor only the same duty he owes his own employees, "and that duty [is] to disclose hidden defects of which the defendant was aware or of which in the exercise of reasonable care it should have known. Except in cases of hidden defects, the employer owes no duty to alter the conditions where the work is to be done or to make them safe for the employee." *Burr* v. *Massachusetts Electric Company*, 356 Mass. 144, 147, 248 N.E. 2d 492, 495 (1969).[7] This rule, now mitigated in virtually all cases (as in Powers') by comprehensive workmen's compensation laws, was established in an earlier era when the cost of industrial accidents was but rarely imposed on an employer. Whatever its shortcomings, we are bound by it. The defect in the light bulb was not hidden; Powers had noticed bulbs popping and had in fact complained about the danger to Bethlehem employees. That appellant had not seen the light bulb which exploded is unimportant, given his familiarity

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[7] *See also Barrett* v. *Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971); *DeMartin* v. *New York, New Haven & H. R.R. Co.*, 336 Mass. 261, 143 N.E.2d 542 (1957); *Hannon* v. *Hayes-Bickford Lunch System, Inc.*, 336 Mass. 268, 145 N.E. 2d (1957); *Gallo* v. *Leahy*, 297 Mass. 265, 8 N.E. 2d 782 (1937); *Faverau* v. *Gabele*, 262 Mass. 118, 159 N.E. 738 (1928).

with the bulbs' propensity to pop and their lack of shielding.[8]

Appellant's argument that Bethlehem violated a duty to supply safe equipment must fail also, since recovery would depend on Powers' not knowing that the equipment was defective. *Cf. Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, 489 (1878); *White* v. *Newborg*, 208 Mass. 279, 281, 94 N.E. 269, 270 (1911). *See* Restatement of Torts 2d § 493A, comment c(3), §496C. We thus affim the judgment for Bethlehem against Powers.

We find merit in none of the appellant's remaining contentions, dealing mostly with the exclusion of evidence at trial. The verdict in his favor cured any possible prejudice before the jury. We ourselves have considered and, for purposes of this decision have accepted in its aspect most favorable to appellant, the excluded proof relative to the status of the raft. Other exclusions, such as of certain evidence relative to his alleged crew status, were harmless in view of our conclusion that the raft was not a vessel. Given our disposition of the case, the district court's unwillingness to allow appellant to armend the complaint could not have been prejudicial.

Affirmed.

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[8]Powers' earlier unheeded requests for shielding indicated that he knew of the likelihood of danger as well as of the possibility of the bulbs' popping. Restatement of Agency 2d § 521, comment b; § 522.